FAIR POLITICAL PRACTICES COMMISSION

MEMORANDUM

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption of Recall Election Fact Sheet

Date: July 28, 2003

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In March of 2003 the Commission approved a fact sheet, titled "Recall Elections," which updated a 1999 version on the same subject. The revised fact sheet included statutory changes made to the Act by Proposition 34. The fact sheet covered the disclosure obligations and limits applicable to candidates and committees involved in a state recall election.

In July, the Commission adopted regulation 18531.5, implementing section 85315, addressing the subject of recall elections. The primary aspects of the regulation are as follows:

1. The contribution limits of the Act do not apply to contributions accepted by the target elected officer into a committee established to oppose the recall. Similarly, the expenditure limits do not apply to expenditures made by the target to oppose the recall. (Reg. 18531.5, subd. (b)(1).)

2. The contribution limits apply to replacement candidates who are seeking elective state office. (Reg. 18531.5, subd. (b)(2).)

3. Committees primarily formed to support or oppose a recall are ballot measure committees not subject to the Act's contribution limits. (Reg. 18531.5, subd. (b)(3).)

When the Commission adopted regulation 18531.5, the Commission directed staff to revise the Recall Elections fact sheet to address additional issues surrounding recall elections. The Commission also asked for input from the community to assist in the revision of the fact sheet. An updated fact sheet is presented to the Commission for consideration and approval. The fact sheet seeks to address many of the issues that were discussed at the Commission's July meeting and anticipates other issues that may arise in the recall process. This memorandum discusses several major issues that were discussed at the Commission's July meeting and addressed in the revised fact sheet.[1]

[1] The attached revised fact sheet merges the fact sheet adopted in March, 2003, with new questions and issues concerning regulation 18531.5 and the current recall drive. The introductory paragraph and questions 23-27 of the draft revised fact sheet are essentially unchanged from the March, 2003 fact sheet. The remaining text is either new or heavily revised.

I. TARGET OFFICERS – THE MEANING OF "OPPOSING" A RECALL ELECTION

Proposition 34 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to *oppose* a recall. Section 85315 states:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

Thus, regulation 18531.5, consistent with previous staff advice on the question, states that the target of a recall is not subject to contribution limits in his or her effort to oppose the recall. (E.g., *Roberti* Advice Letter, No. A-89-358.) During the July meeting, various scenarios were posed seeking to illuminate the boundaries of activities that constitute "opposing" a recall. For instance, most observers agreed that section 85315 and regulation 18531.5 permit the target of the recall to raise unlimited contributions and make expenditures directly addressing the first question of a recall: Should the elected official be recalled? Most often, these expenditures would be related to communications advising the public to "vote no," for instance, on the recall or tout the accomplishments of the target official. Debate centered, however, on whether the target officer could raise and use unlimited funds for communications that either were a hybrid, addressing both the first and second (shall Jane Doe be elected to the office to replace the recalled official?) recall ballot questions or that entirely addressed only the second. In this regard, it was discussed whether the communications explicitly addressing only the second question could really be said to "oppose" the recall if the communications only were directed to opposing a given replacement candidate. Regarding hybrid expenditures that address both questions, such as "I deserve to be kept in office and Jane Doe is unqualified," the question arose whether candidates would be forced to apportion the expenditure in some manner between a committee that raises unlimited funds and a separate committee created to oppose replacement candidates.[2]

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[2] In the staff memorandum on the recall issue for the July, 2003 Commission meeting, staff stated that amendments to the state Constitution and recent amendments to other laws consolidated the two recall questions onto the same ballot. In fact, the appearance of both questions on the same ballot, whether to recall and with whom to replace the recalled official, can be traced to the original constitutional recall provision adopted by the voters in 1911, in then-section 24 of the state Constitution. In November of 1974, that provision was renumbered in the Constitution by the voters in adopting a revised recall proposition, Proposition 9 (not to be confused with Proposition 9 on the June ballot in 1974 that created the Political Reform Act and the Fair Political Practices Commission). In 1994, Proposition 183 added a 180-day option for holding a recall election under certain circumstances but did not affect the issue of consolidation.

The fact sheet answers these questions by stating that an elected state officer who is subject to a recall may make expenditures to oppose the recall and expenditures to oppose replacement candidates from his or her committee. (Fact Sheet, Q. 8.) This conclusion is based on section 85315's broad language allowing the target to "oppose the recall election" without hindrance from contribution limits. Expenditures opposing a replacement candidate may be an integral part of a target candidate's strategy to succeed ultimately in opposing the recall and can have virtually the same effect as an expenditure to "vote no on the recall." By opposing a replacement candidate, the target implies that a successful recall will bring negative consequences in the form of the replacement candidate. Thus, the worse alternative counsels to stay the course. The viability of a replacement candidate and its effect on the possible outcome of the vote on the recall election itself was acknowledged in press accounts of a strategy memorandum prepared by a consultant for a pro-recall group. (Margaret Talev, *Memo's a Recipe for Recall*, Sacto. Bee, July 18, 2003; Marc Sandalow, *Issa Forces Told How to 'Trash' Governor - Recall Troops Urged by GOP Consultant to 'Kill Davis Softly'*, S.F. Chronicle, July 18, 2003.) A recall committee may also make expenditures that call for a recall and support a replacement candidate. Therefore, a target candidate should be able to fully address the opponents.

Moreover, this approach eliminates the need to assess all expenditures of the target to determine which may have a dual purpose and whether and how the relative costs should be apportioned and by what standards the expenditures are to be assessed. While one can conceive of a target candidate who, sensing defeat, throws in the towel and makes expenditures supporting a given replacement candidate over another, such an event seems first, unlikely, and second, problematic.

II. MAY CANDIDATES CONTROL BALLOT MEASURE COMMITTEES?

The question of whether a replacement candidate may also control a ballot measure committee is a critical one. Because ballot measure committees generally are not subject to contribution limits under *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, and because the Commission already has determined that replacement candidate committees remain subject to contribution limits, different rules will apply in the event a replacement candidate is able to control both a ballot measure committee as well as his or her own candidate committee. The fact sheet states that a replacement candidate may control a ballot measure committee formed to support a recall and addresses several scenarios to help answer common questions. (Fact Sheet, Q. 9.)

Section 82043 of the Act includes recalls within the definition of "measure," and therefore the FPPC's interpretation has proceeded under that framework. Accordingly, the FPPC has consistently advised that the contribution limits of the Act do not apply to proponents or opponents of a recall measure. Also, it is long-standing advice that a candidate may control a ballot measure committee. (*Kopp* Advice Letters, Nos. A-97-390 and A-97-390a; *Olson* Advice

Letter, No. A-89-363; *Leidigh* Advice Letter, No. A-89-170.)[3] In *Kopp,* staff issued advice to a state senator concluding that a ballot measure committee which was controlled by the senator was subject to Proposition 208's statute, stating the contribution limits applied "to any candidate." The proposition's contribution limits applied to "any candidate or the candidate's controlled committee." (Former § 85301.) Although in the singular, the letter noted that "controlled committee" had been interpreted elsewhere in the Act to be plural and cited Government Code section 13, an interpretive statute for the code, that states "the singular number includes the plural, and the plural the singular." Staff also observed that there was no indication in Proposition 208 that voters intended to change the definition of a candidate-controlled committee to exclude ballot measure committees. Nevertheless, the Commission voted in October of 1997 to rescind that advice, Senator Kopp consequently was advised that the contribution limits did not apply to candidate-controlled ballot measure committees. As a result, previous Commission positions support the conclusion that a replacement candidate in a recall election may also control a ballot measure committee formed to support the recall election.[4]

A contrary conclusion implicates issues surrounding the First Amendment right of free speech, as well. Also, practical problems can arise if a person who is not a candidate controls a ballot measure committee supporting the recall and then later becomes a candidate. Moreover, there is nothing in the Act prohibiting candidates from controlling ballot measure committees.

By stating that replacement candidates may also control a ballot measure committee formed to support the recall, the Commission avoids unnecessary constitutional and practical problems and follows historic Commission determinations in similar contexts.

III. APPORTIONMENT OF JOINT EXPENDITURES BY A REPLACEMENT CANDIDATE

In light of the determination that a replacement candidate may also control a ballot measure committee formed to support the recall, questions arise regarding "hybrid" expenditures that implicate both the question of whether to recall the target officeholder and the question of who shall replace the target if the recall succeeds. These issues are addressed in questions twelve through fifteen of the fact sheet. The essential test for whether and how "hybrid" expenditures may be apportioned is whether the expenditure can clearly be shown to relate solely to the ballot measure question. (Fact Sheet, Q. 14.)

The analysis begins with observance of the cardinal one-bank-account rule of sections 85200 and 85201. According to this rule, any campaign expenditures of a candidate for election to a specific office must be made from the candidate's committee created for that office. As a result, a ballot measure committee also controlled by the candidate may not make expenditures that promote the candidate's candidacy. While it may be true that an expenditure by a ballot

[3] The *Olson* letter allowed the candidate to control the ballot measure of a candidate running for office even though the contributions to the ballot measure also might indirectly benefit the controlling candidate.

[4] The question of when a candidate "controls" a committee is addressed in "Question 10" of the fact sheet.

measure committee that relates solely to the ballot measure question (and thus not subject to contribution limits) may indirectly benefit the candidate's election campaign insofar as it increases the likelihood that the second question in the election will be reached, it does so without reference to the candidate him/herself and arguably will have just as much impact on other replacement candidates as well. Thus, expenditures from a ballot measure committee controlled by a replacement candidate may only address the first question on the ballot – whether to recall the elected official. (Fact Sheet, Q's. 12, 15.)

As to the replacement candidate's election committee, nothing in the law requires a replacement candidate to create a separate ballot measure committee to support the recall. The only incentive for doing so is, of course, the absence of contribution limits to such a committee. Nevertheless, it is conceivable, if not likely, that expenditures by a replacement candidate may implicate both ballot questions separately and the Fact Sheet allows apportionment where a candidate can clearly show that a part of an expenditure relates solely to the ballot measure issue. The cost that may be borne by the ballot measure committee correlates its proportion of the overall expenditure. Where a candidate cannot make the showing described, the expenditure must be paid for by the candidate's election committee. In this way, the candidate is responsible for bearing the burden of any ambiguity created by his or her expenditures.

IV. MISCELLANEOUS CASE LAW

At the July meeting, two cases of uncertain relevance were brought to the attention of the Commission. Each is addressed below.

A. The W*ax* Case.

The case of *Wax v. FPPC* in 1990 in the United States District Court, Eastern District of California, was part of a fusillade of legal challenges stemming from the voters' adoption of Proposition 73 in 1988. Among the many provisions of Proposition 73 were limits on contributions among candidates and the ability for candidates to transfer funds to and among other candidates. At issue in the case were two regulations propounded by the Commission which described situations in which a communication by a ballot measure committee would be treated as a contribution to a candidate featured in the communication. In granting a preliminary injunction barring the Commission from enforcing the regulations in the relevant context of the case, the court enjoined the Commission from taking any action:

> "…that treats an expenditure by a ballot measure or candidate committee as a 'contribution' to an individual running for office, *when the expenditure is made to publicize an endorsement by that individual*, unless the endorsement message being publicized includes express advocacy of the election or nomination of the endorsing individual." (Order of Judge Karlton, 10/10/90; italics added.)

As can be seen from the language of the order, the challenge made and the relief granted relate to the very narrow circumstances italicized in the quoted text above. Since the case involved language of a statutory and regulatory scheme no longer in place in a very limited factual context, staff does not believe that the *Wax* case is determinative of the issues addressed in regulation 18531.5 and the Recall Elections fact sheet.

B. *Citizens for Clean Government v. City of San Diego*.

On July 7, 2003, a federal district court in southern California issued an order denying an application for a preliminary injunction barring enforcement of a local ordinance that had the effect of subjecting a recall committee to local contribution limits. The court concluded that "the recall process cannot be likened to a ballot measure, and should instead be treated as a candidate campaign… ." (*Citizens for Clean Government v. City of San Diego* (2003) (S.D. Cal.) Civ. No. 03-1215 J.)

In *Citizens*, the plaintiff was a committee seeking to recall a San Diego city councilman. The plaintiff wished to hire paid signature gatherers to qualify the recall. A city ordinance, however, limited the amount of money that could be contributed to such a campaign, which covered recall campaigns as well as traditional candidate elections. The suit alleged First Amendment free speech violations. The plaintiff alleged that the recall could be divided into three discrete segments: the signature gathering for the recall petition, the vote on the petition, and if the recall was voted onto the ballot, the resulting election of a replacement candidate. The suit requested the court lift the contribution limitation only for the signature gathering portion of the process, alleging that since a recall petition was not the same as a candidate campaign, the contribution limits in the recall were unconstitutional.

The court agreed with the city, concluding that gathering signatures to support a recall petition "cannot be likened to a ballot measure." (*Id*.) The ordinance "specifically contemplates that a successful recall petition results in a recall proposal on the ballot which names an alternate candidate." (*Id.*) The court concluded, therefore, that the "recall petition circulation process is therefore similar to a reverse election rather than a drive to create a ballot measure" and should be treated as a candidate campaign as provided in the local ordinance. (*Id.*)

Several important points must be made with respect to the case's relevance here. First, procedurally the case is at a very nascent stage. While a ruling on an application involves a preliminary assessment of the likelihood of success, it is not the final adjudication on the matter and usually occurs within days of the commencement of the suit. Second, as discussed above, section 82043 of the Act defines "measure" to include a recall. The court in *Citizens* did not construe this provision for the scheme before it was a local one with different definitions. Moreover, the court's conclusion does not conflict with section 81013 of the Act which permits local jurisdictions to impose additional requirements on persons so long as they do not prevent compliance with the Act. Therefore, section 81013 has been construed to mean stricter local rules are acceptable because they do not prevent compliance with the Act. (*Graves* Advice

Letter, No. A-97-416.) In anticipation of this issue, regulation 18531.5 addresses this issue in the "Comment" to the regulation. Finally, the case does not present controlling authority for the Commission because the ruling comes from a district court. As a result, while informative the case does not provide guidance to the Commission in its interpretation of the Act.

V. RECOMMENDATION

Staff recommends the Commission approve the revised Recall Elections Fact Sheet.

Attachment:

Exhibit 1: Recall Elections Fact Sheet